

IN THE
United States Circuit Court
of Appeals for the
Ninth Circuit

WILHELM WILHELMSSEN,
Libelant and Appellee,

vs.

THE BARK "THIELBEK,"
Knohr & Burchard, Nfl.,
Claimants and Appellees,

THE PORT OF PORTLAND,
Respondent and Appellant.

KNOHR & BURCHARD, Nfl.,
Libelant and Appellee,

vs.

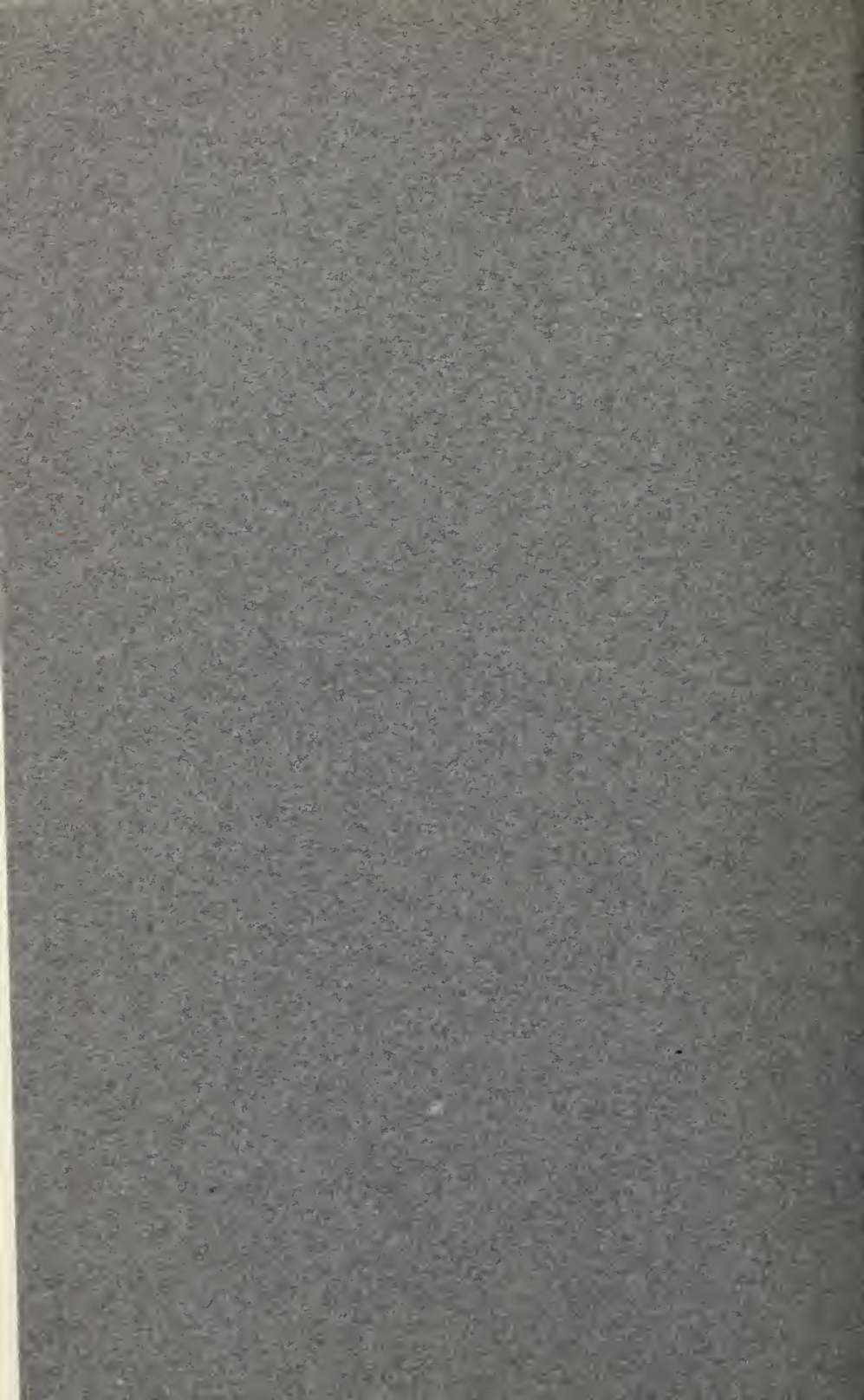
THE "THODE FAGELUND,"
Wilhelm Wilhelmsen,
Claimant and Appellant,

THE PORT OF PORTLAND,
Respondent and Appellant.

No. 2769

Petition for Rehearing

WILLIAM C. BRISTOL
For Petitioner



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Said causes being numbered 6116 and 6111 in the Court below.

Petition for Rehearing

TO THE HONORABLE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIR-
CUIT:

Wilhelm Wilhelmsen feeling himself aggrieved
herein by the decision, judgment and opinion of

this Court given and rendered on Monday, the 5th day of March, 1917, respectfully presents this his petition for rehearing and for cause and ground thereof doth respectfully show and present:—

First:

The appellant submitted to this Court the record fact that on October 25, 1915, on the application of the proctor for The Port of Portland, the Court below consolidated all of the causes for the purpose of appeal (see record Vol. 1, p. 283, main brief pp. 98 and 99, main brief p. 101, record Vol. 1, pp. 270 to 272) and therefore the supplemental assignments of error were filed charging that the Court below erred in giving a judgment in favor of Knohr & Burchard, Nfl., for any amount in costs after the Court had originally entered a decree in favor of the "Thielbek" and its owners.

While it is true that Wilhelmsen took no appeal from the decree of October 25, 1915, the appeals taken under the orders of the Court below brought all of the causes, save the libels of the cargo owners, before this Court.

The specific point is not decided by the Court in its opinion, namely, *whether the Court below lawfully exercised the power which it undertook to exercise, after it had passed its order on October 25, 1915, consolidating these causes on appeal, to proceed in 1916, long after it had lost control*

of the previous matters, and then undertake to determine questions of costs and deny the recovery of the same to one party and allow them to the other on a different ground than was stated by it in its decree of June 24, 1915, from which both this petitioner and The Port of Portland appealed.

It will be noted that in the decree of June 24, 1915, which this Court has affirmed with the modification, there was allowed as costs \$239.49.

In the decree entered on the 31st of January, 1916, on the identical matters that had previously been adjudicated June 24, 1915, involving the same collision, the Court in dismissing Wilhelmsen's libel against the "Thielbek" allows costs and disbursements in the amount of \$2247.93.

The question presented was whether the Court had power to do this under the then state of the record.

It is respectfully submitted that the opinion rendered on the 5th of March, 1917, does not dispose of this point, but on the contrary seems to proceed upon the theory that because no appeal was taken the situation thus presented is not open to question. *This point was argued and submitted on pages 168 to 171 of the main brief.*

Second:

The specific point was submitted to the Appellate Court under the specifications of error and the evidence that at a point a thousand feet before the "Thode Fagelund" turned on her course Pease, the pilot of the "Ocklahama," admitted there was plenty of room for him to turn, but nevertheless he kept on and ran with such force into the "Thode Fagelund" that the bow of the "Thielbek" cut into her 26 x 19 feet and the tug "Ocklahama" parted every one of her hawsers and run up about amidships of the "Thode Fagelund" on the starboard side between the dredge and the ship; and it was submitted to the Appellate Court that under its own ruling in the cases of

• "*Bailey Gatzert*," 179 Fed. 47;

"*Santa Maria*," 227 Fed. 149;

"*Manzanita*," 176 Fed. 871.

In the first of these cases this Court held that speed was demonstrated by the impact and effect of the blow and in the last case the officers of the "Manzanita" were held responsible and damages were divided because this Court said from the evidence that there was room to turn and avoid the collision, although the dredge and tow were themselves originally in fault.

But the Court in its opinion of March 5th says: "We agree with the Court below that the evi-

dence fails to show that at any of the times in question the tug with her tow was guilty of excessive speed or that it discloses any negligence on the part of either of those vessels."

It seems clear that this Court overlooked the rule which it has always adhered to and which was announced plainly in the "*Albert Dumois*," 177 U. S. at p. 252, 44 L. Ed. 751, where Mr. Justice Brown, writing for the Court, said:—

"This court has repeatedly held the fault, and even the gross fault, of one vessel does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require."

The presiding Judge of this Court on October 23, 1916, wrote in the case of the "*Virginian*," 238 Fed. 156, the opinion for this Court and applied this rule in a collision case.

This matter was all presented in the main brief at pages 104 to 107.

It is conceived that the Court for some reason overlooked the application of this rule to this case.

Third:

The point was submitted to the Appellate Court on the appeal that the lower Court having found The Port of Portland the primary *tortfeasor* through the negligence of its pilots (and that decision now having been affirmed by this

Court), upon the same state of facts in all of the cases and then consolidated them on the 25th of October, 1915, it was not within the Court's discretion below to separately adjudicate the different liabilities of the parties and give relief over against Wilhelm Wilhelmsen alone.

In other words, the trouble with the decree passed on the 24th of June, 1915, from the standpoint of the legal result now accomplished is that it penalizes Wilhelmsen and his stipulators in costs and interest and damages which both the lower and upper Court say were caused by The Port of Portland; but in the "Thielbek" case the result is to force Wilhelmsen to pay first and before The Port of Portland is required to pay anything, and in his own case he is required to pay \$2247.93 and is denied recovering these costs from The Port of Portland as the matter now stands.

(See Main Brief, p. 170.)

It is submitted that what this Court meant to do in the affirmance of these matters, if that is what was intended, was to so do equity according to the admiralty and maritime procedure that if no correction in the foregoing points can be had, at least Wilhelmsen should have only to pay in the event that The Port of Portland did not pay, and that if he pays the "Thielbek" costs as decreed in his own case, that he certainly should be allowed to have those costs against The Port of Portland.

This was clearly put to the Appellate Court by alleging and showing abuse of discretion in the Court below, particularly for the reason that it was after the Court had lost control of the case that it undertook to pass such a decree.

(*See Main Brief p. 171.*)

WHEREFORE, your petitioner doth say that he is especially aggrieved by the judgment, order and decision of March 5, 1917, in the particulars aforesaid wherein the matters of consideration herein referred to were apparently not disposed of as to the admiralty and maritime jurisdiction doth appertain, and so it is that your petitioner prays a reconsideration that full and complete justice may be done if it be that this Court should see fit to consider for the reasons given and grant a rehearing or in lieu thereof modify to further extent before the mandate comes down the rulings and opinion hereinbefore made, your petitioner will ever pray.

WILHEIM WILHELMSSEN,
Of Tunsberg, Norway,
Appellant Petitioner.

WILLIAM C. BRISTOL,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA, }
 State and District of Oregon. } ss.

I, the undersigned, do hereby certify that I am counsel for the appellant, petitioner for rehearing in the above entitled cause and Court; that I prepared the foregoing petition for rehearing and that it is not interposed for delay, inconvenience or embarrassment; that in my judgment the grounds and reasons therein stated for the rehearing are well founded.

WILLIAM C. BRISTOL,
 Counsel for Petitioner.